

Fuller, Ned, GSD

From: Fuller, Ned, GSD
Sent: Thursday, November 15, 2018 11:19 AM
To: Forte, Anthony, DFA
Cc: Gardner, Keith, GOV; Rodriguez, Duffy, DFA
Subject: RE: Contract Protests
Attachments: Procurement Letter.pdf; Professional Services Contract.pdf; 15-7-10.pdf

Mr. Forte,

I have reviewed your letter of today's date. You have raised your interpretation of NMSA § 15-7-10 previously. While I disagree with your interpretation, in an abundance of caution, and pursuant to DFA MAPS FIN 4.13.1, I referred this matter to the State Procurement Agent on October 31, 2018. I have attached his opinion:

I have also attached a sample of the contract amendments at issue. These Amendments, approved by DFA, extend the contract date and the amounts associated with the respective contracts. No other terms were changed and the Amendments specifically state "[a]ll other articles of the contract remain the same". This would include Article 27 giving the Risk Management Division the authority to assign cases.

As we discussed NMSA § 15-7-10 is clear that there is an automatic extension for legal services contracts for work referred to the contractor "prior to the termination date stated in the contract or any applicable amendment thereto." The relevant contracts were amended with approval of DFA to extend the termination date to September 30, 2018. As you know during this time frame a new RFP was issued and new contracts were put in place. There were a few firms that submitted proposals and were denied a contract. They protested. The protest resolution extended past September 30, 2018. Consequently, because no new amendments were put in place to extend the termination date regarding those contracts, no new cases were assigned to these firms after September 30, 2018.

The actions taken above, again with the approval of DFA, were taken to ensure that the State Agencies and employees had coverage and counsel regarding claims and lawsuits initiated during the relevant time frames. I suspect NMSA § 15-7-10 was put in place for just such a purpose given the nature of litigation and the associated deadlines.

Regarding payouts from the claims files, I assure you we will not engage in any conduct that you did not engage in when you served as the Risk Management Director.

I hope this addresses your concerns. However, if you have any additional questions, please feel free to contact me.

Thanks,

Ned S. Fuller
Acting Cabinet Secretary
General Services Department
1100 St. Francis Drive, Room 1004
P.O. Box 6850
Santa Fe, New Mexico 87502
Tel: (505) 827-2000

From: Forte, Anthony, DFA
Sent: Thursday, November 15, 2018 10:03 AM



SUSANA MARTINEZ
GOVERNOR

NED FULLER
ACTING CABINET SECRETARY

LAWRENCE MAXWELL
DIRECTOR
STATE PURCHASING DIVISION

State of New Mexico
General Services Department

ADMINISTRATIVE SERVICES DIVISION
(505) 476-1857

FACILITIES MANAGEMENT DIVISION
(505) 827-2141

PURCHASING DIVISION
(505) 827-0472

RISK MANAGEMENT DIVISION
(505) 827-2036

STATE PRINTING & GRAPHIC SERVICES BUREAU
(505) 476-1950

TRANSPORTATION SERVICES DIVISION
(505) 827-1958

November 15, 2018

Ned Fuller, Acting Cabinet Secretary
New Mexico General Services Department
1100 St. Francis Drive
Santa Fe, NM 87505

Dear Secretary Fuller:

You have presented the following fact situation to me for analysis as a potential procurement violation:

"I write to you in your role as the State Purchasing Agent under DFA MAPS FIN 4.13.1. A concern has been raised regarding legal services assignments under the contracts involved. As I understand the concern, the original contracts for legal services terminated June 30, 2018. The Division responsible for the legal services procurement process, the Risk Management Division (RMD), amended the contracts at issue prior to their termination. The Amendment extended the contracts' termination date to September 30, 2018. During that time frame, from July 1, 2018 to September 30, 2018, approximately 25 cases were assigned for defense. The concern reported to me was that under NMSA 1978 § 15-7-10 (15-7-10) no assignments for defense can be made once the contract termination date has passed. The RMD position is that the termination date was extended to September 30, 2018 with approval of the Department of Finance and Administration (DFA). Thus, assignments could be made during the July to September time frame.

"I ask that you review this matter and:

1. "Determine whether a procurement violation has occurred under 15-7-10; and
2. "If you find a violation has occurred, what, if any, action is appropriate."

Following my review of the facts and law presented, it is my determination there was no Procurement Code violation. Because of the need to provide legal representation by the risk management division of the General Services Department (GSD) to defend claims against the state or any of its public employees pursuant to Subsection B of Section 41-4-4 NMSA 1978, the legislature

created an exception to the Procurement Code at 15-7-10 for these purposes. Section 15-7-10 automatically extends legal services contracts to provide continuous representation for ongoing matters. This extension takes effect immediately upon expiration of the underlying term and need not be in writing. Section 15-7-10 extends the contract term for as long as necessary to complete and conclude any matter in litigation, including appeals, referred to a firm for defense prior to the termination date stated in the contract or applicable amendment. As noted, the exception created by 15-7-10 eliminates any requirement for RMD to take action and create a formal written amendment to modify existing legal services contracts for the purpose of continuing the defense of "ongoing litigation matters" by a law firm.

In addition to the automatic extension, RMD may also amend or modify the contract through a written instrument as a regular contract renewal under 15-7-10. Pursuant to Sec 13-1-42 NMSA 1978, a "[c]ontract modification" means any written alteration in the provisions of a contract accomplished by mutual action of the parties to the contract". Such contract amendments, unless otherwise provided, will retain all of the underlying scope of work, rights, duties and obligations of the parties, and thus only be modified by the new action of the parties. Accordingly, unless stricken from the modified contract by the new amendment, the original right and power for new matter assignments, as well as continuation of representation and the defense of reassigned matters will remain as contract provisions. When a written contract amendment occurs, RMD may assign new work to firms without the requirement of there being an "ongoing litigation matter". In this case, pursuant to 15-7-10 and by written amendment, RMD memorialized the extension of the contracts of only the law firms with ongoing legal matters. RMD did not change any of the underlying other terms and conditions of the original contracts.

Therefore, it is my Determination that the underlying contracts involved were amended in writing, executed by all parties, including DFA, prior to July 1, 2018, and as amended extend the termination date to September 30, 2018. Further, it is also my Determination that, as modified the contracts are a regular contract renewal as contemplated by 15-7-10. Accordingly, RMD may properly assign new matters during the extension period. Therefore, neither these contract extensions nor the assignments made during the pendency of those extensions created a procurement violation under 15-7-10.

Finally, as no procurement violation(s) occurred, there is no further action needed by the parties.



Lawrence O. Maxwell
State Purchasing Agent

Cc: Ron Spilman, Director FC

Attachment: Reference Material